IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

JP Appeal 1/11

(CR NO. 137/2009)

POLICE

v

YVONNE TEVAIA ALEXIAS QUARTER

Date: 8 April 2011

Counsel: Ms C Evans for the Crown
Mr N George for Informant

Judgment: 8 April 2011

JUDGMENT OF HUGH WILLIAMS J

Solicitors:
C Evans, Crown Law Office, Avarua, Rarotonga (Catherine@crownlaw.gov.ck)
N George, Norman George & Associates, Avarua, Rarotonga (lawman@oyster.net.ck)

[1] This is a Crown appeal against orders for suppression of Mrs Quarter's name and the amount she stole, entered on 24 February 2011 when she pleaded guilty to an amended charge of theft as a servant. The orders for suppression were made by a Justice of the Peace and Ms Evans brings this appeal on behalf of the Crown – pretty much as a test case – to set the guidelines for the way in which such matters should be dealt with henceforth in the Cook Islands.

[2] The Court has jurisdiction to prohibit the publication of names and to forbid reporting of the whole or part of the proceedings under s 25 of the Criminal Justice Act 1967 and s 76 of the Criminal Procedure Act 1980-81.

[3] The orders actually made by the Justice of the Peace on entering the conviction and remanding Mrs Quarter for sentence on 24 February 2011 were, first, reducing the amount stolen by Mrs Quarter from her employer from $77,346.00 to $30,000.00, and then:

> The application by the defence counsel to suppress amounts charged is granted. Application for name suppression is granted up to the sentencing date

[4] In fact, the Information against Mrs Quarter was filed on 3 February 2009 alleging theft as a servant in the 18 months or so prior to that date, and on 18 June 2009 an order was made – coincidentally by the same Justice of the Peace – for suppressing Mrs Quarter's name . That order was continued over a number of subsequent appearances in Court. None of the original suppression of 18 June 2009, the orders continuing the suppression on subsequent appearances nor, as mentioned, the order on 24 February 2011 were accompanied by any reasons for the orders being made, and the Crown brings this as a test case in consequence.

[5] For the respondent, Mr George argues, first, that the order suppressing publication of the amount of money stolen related only to the amount originally charged and not that arrived at by negotiation between counsel for the Crown and the defence in the run up to the hearing. Secondly, he says that the reasons for

suppression of name would have been manifest to the Justice of the Peace as Mrs Quarter was then heavily pregnant and her confinement was due within a week or two and, he said, hospitalisation was expected. They were, as he put it, "humanitarian" grounds for the suppression even though not recorded by the Justice of the Peace. While that may be so, it is difficult to see how those grounds could apply to orders for suppression of name made before about mid-2010.

[6] Turning to the issue of principle, the questions of appropriateness of orders suppressing names of defendants in criminal proceedings and other details of the prosecution have been a vexed topic over many years in many jurisdictions, even if not previously discussed and decided upon the Cook Islands. In New Zealand s 140 of the Criminal Justice Act 1976 contains provisions similar to the Cook Islands provisions in ss 138 and 140, and they have been examined by many Courts particularly over recent years. The current law in New Zealand is conveniently summarised in the decision of the Court of Appeal in *Lewis v Wilson & Horton Limited*.[1] The facts in that case which gave rise, first, to the order for suppression and then to the appeal were unusual and although related by the Court of Appeal in the Judgment needs no recital in this case.

[7] However, from paragraph [40] onwards the Court of Appeal reviewed the precedent which underpins ss 138 and 140. It started from the general principle that criminal prosecutions are – other than in special circumstances – conducted in Courts which are open to the public and to their surrogate, the Press, and accordingly whether a defendant's name or other details of their case are published starts from the standpoint that publication should be permitted unless circumstances show that to be inappropriate. That has been the case since at least *Scott v Scott*[2] in the House of Lords. That has been continued through a number of New Zealand cases including *R v Liddell*,[3] where the Court of Appeal stressed that publications of names and other particulars relating to the prosecution of criminal defendants always start from a presumption of reporting. In *Lewis v Wilson & Horton Limited* the Court of Appeal went on to say:

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[1] *Lewis v Wilson & Horton Limited* CA131/00 29 August 2000.
[2] *Scott v Scott* (citation)
[3] *R v Liddell* [1995] 1 NZLR 538 at 546-7.

[42] Factors it is usual to take into account in deciding whether the prima facie presumption should be displaced n the case include:

- whether the person whose name is suppressed is acquitted or convicted. If acquitted, the Court may more readily apply the power to prohibit publication, although in *R v Liddell* the Court recognised (in adoption of *R v D(G)* (1991) 63 CCC (3d) 134) that the public has an interest in acquittals also.

- the seriousness of the offending. Where a person is convicted of a serious crime it will only be in rare cases that name suppression will be ordered. Where the charge is "truly trivial", particular damage caused by publicity may outweigh any real public interest (*R v Liddell* at 547);

- adverse impact upon the prospects for rehabilitation of a person convicted' see, for example, *B v B* (High Court Auckland, 4/92, 6 April 1993, Blanchard J);

- the public interest in knowing the character of the person seeking name suppression, an interest which has been acknowledged in cases involving sexual offending, dishonesty, and drug use (see, for example, *R v Liddell*; *M v Police* (1999) 8 CRNZ 14, *Roberts v Police* (1989) 4 CRNZ 429); and

- circumstances personal to the person appearing before the Court, his family, or those who work with him and impact upon financial and professional interests. As it is usual for distress, embarrassment, and adverse personal and financial consequences to attend criminal proceedings, some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting.

[43] The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield. And since the Judge is required by s 3 to apply the New Zealand Bill of Rights Act 1990, it will be necessary for the Judge to consider whether in the circumstances the order prohibiting publication under s 140 is a reasonable limitation upon the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5). Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome.

[8] Pausing at that point to revert to the position in the Cook Islands, although there is nothing entirely comparable in the Cook Islands to the New Zealand Bill of Rights Act 1990, freedom of expression is vouched-safed to persons in the Cook

Islands by Article 64 of the Cook Islands Constitution, and the openness of Court proceedings and availability of information is now supported indirectly by the passage of the Official Information Act in this country.

[9] Reverting to *Lewis v Wilson & Horton Limited*, one of the grounds of appeal there was that the District Court Judge who originally dealt with the issue in the way described in the case failed to give appropriate reasons for the orders he made suppressing the appellant's name. Although lengthy, in a passage which may be of assistance to the Justices of the Peace in the Cook Islands, it is pertinent to cite from *Lewis v Wilson & Horton Limited*:

> [74] The Full Court considered that the case was one where the Judge was obliged to give reasons. It did not grant judicial review on that basis, however, although it indicated that if the matter had come before it on appeal it might well have granted the appeal on the grounds of lack of reasons alone. It is not clear why the Full Court drew the distinction.
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> [75] There is no invariable rule established by New Zealand case law that courts must give reasons for their decisions. That is a proposition which may seem surprising. Many may think that it is the function of professional Judges to give reasons for their decisions. And in recent years the general proposition has been steadily eroded in the United Kingdom and Australia, although in Canada the traditional view seems still to be adhered to (see *R v Harrow Crown Court: ex parte Dave* [1994] 1 WLR 98; *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA); *Housing Commission of New South Wales v Talmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 386 per Mahoney JA; *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667 per Gibbs CJ, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *R v Barrett* [1995] 1 SCR 752, 753; *R v R* [1996] 2 SCR 291, 336).
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> [76] There are three main reasons why the provision by reasons by Judges is desirable. Others are identified in *Singh v Department of Labour* (1999) NZAR 258, 262-3. Most importantly, the provision of reasons by a Judge is an important part of openness in the administration of justice. The principle of open justice in criminal proceedings is affirmed by s138(1) of the Criminal Justice Act 1985 and s25(a) of the New Zealand Bill of Rights Act 1990, but it is far older in observance and extends beyond criminal proceedings (although it is of particular importance there). It yields only where the application of the general rule in the particular circumstances of the case would frustrate the interests of justice, and then only to the extent necessary; (*Broadcasting Corporation v Attorney-General* [1982] 1 NZLR 120, 123 per Woodhouse P; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440, 450 per Lord Diplock; *Police v O'Connor* [1992] 1 NZLR 87, 95-96 per Thomas J). There were no special circumstances in the present case which required modification of the principle of open justice.

[77] Moreover, the lack of reasons in the present case failed to correct irregularities in the conduct of the hearing. It was understandable that the Judge should have acceded to the request from the police prosecutor to see counsel for the appellant and the prosecutor in Chambers. But it was a course which carried special risks for the principle of open justice. It made it incumbent on the Judge to take care in communicating his eventual decision. In the event, the interests of open justice were not served. As the transcript of the proceedings indicates, the public exchanges between counsel, the police prosecutor and the Judge proceeded by allusion to the written material and what had transpired in Chambers. The case would have been largely unintelligible to anyone present in Court. It effectively proceeded on a basis understood only by those who had participated in the Chambers hearing.

[78] It was a breach of the principles of open justice that the submissions on disposition in a criminal case were received in private and the summary of facts was taken as read in circumstances where the Judge did not then refer to them in reasons delivered in open court. Submissions on disposition may be received in writing and on a confidential basis only in exceptional circumstances (*Broadcasting Corporation v Attorney-General* at 122-123 per Woodhouse P; at 127-128 per Cooke J, at 132-133, 135-136 per Richardson J). As a result of the way the matter was handled, the exercise of judicial function was effectively withheld from public scrutiny.

[79] The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision-making in the courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.

[80] The second main reason why it said Judges must give reasons is that failure to do so means that the lawfulness of what is done cannot be assessed by a court exercising supervisory jurisdiction. Those who exercise power must keep within the limits imposed by law. They must address the right questions and they must correctly apply the law. The assurance that they will do so is provided by the supervisory and appellate courts. It is fundamental to the rule of law. The supervisory jurisdiction is the means by which those affected by judicial orders, but who are not parties to the determination and who have no rights of appeal or rehearing, obtain redress. Their right to seek such review is affirmed by s27 of the New Zealand Bill of Rights 1990. It is important that sufficient reasons are given to enable someone affected to know why the decision was made and to be able to be satisfied that it was lawful. Without such obligation, the right to seek judicial review of a determination will in many cases be undermined.

[81] The reasons may be abbreviated. In some cases they will be evident without express reference. What is necessary, and why it is necessary was described in relation to the Civil Service Appeal Board (a body which carried out a judicial function) by Lord Donaldson MR in *R v*

Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310, 319:

> • . . . the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a freewheeling palm tree.

[82] The third main basis for giving reasons is that they provide a discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice. In the present case it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so.

[83] In New Zealand, the leading case on provision of reasons is *R v Awatere* [1982] 1 NZLR 644, 648-649. The Court declined to lay down "an inflexible rule of universal application", while recognising that "it must always be good judicial practice to provide a reasoned decision". The same view was taken by the majority in a differently constituted Court in *R v MacPherson* [1982] 1 NZLR 650. Somers J was prepared to go further. He would have held in that case that it was implicit in the right of appeal conferred by the Summary Proceedings Act 1957 that the Judge was under a duty to make "such findings or express such reasons or conclusions as in the particular circumstances are necessary to render the right of appeal effective" (*R v MacPherson* at 652). Such reasons, he thought, would not need to be elaborate and would add little to what is usually done in New Zealand courts.

[84] *R v Awatere* was considered and applied in *R v Jefferies* [1999] 3 NZLR 211. That case confirmed that while the giving of sufficient reasons for decision is always highly desirable, it is not an inflexible requirement.

[85] Whether it is time to say that as a general rule Judges must give reasons, is a matter this court would wish to consider at an early opportunity. In the present case however the point arose during argument and was not fully canvassed. It is not necessary to consider whether *R v Awatere* should be revisited, to dispose of the present case.

[86] In the present case the requirements of open justice in criminal proceedings, the right to impart and receive information recognised by s14 of the New Zealand Bill of Rights Act and the need to ensure that those whose rights were affected by the order had an effective opportunity to obtain judicial review, all made it incumbent upon the Judge to give reasons for the order prohibiting publication of the appellant's identity. The High Court was right to say that the Judge was required to give reasons. The failure to give reasons in this case was an error of law.

[87] We differ from the High Court as to the consequences. The error was not one which could be corrected only on appeal; as error of law, the failure to give reasons was a proper and distinct ground of judicial review. It was a sufficient ground, irrespective of whether it was not open to the Judge to grant the s140 application (as we have accepted to be the case)

> and without inferring failure to apply s14 of the New Zealand Bill of Rights Act 1990 (as the High Court preferred to find). On this ground too the decision should have been set aside. In the normal course it would have been remitted to the District Court for determination in accordance with law. The conclusion already reached that the order was not open to the Judge on the material before him, makes such step unnecessary.

[10] That makes clear that an almost invariable consequence of the conduct of criminal proceedings in open Court with the availability of reporting necessitates judicial officers giving reasons for their decisions. It is important to note in the context of this appeal and the practicalities of running a Justices of the Peace Court dealing with a large number of matters in the Cook Islands, that in *Lewis v Wilson & Horton Limited* the Court of Appeal said that the reasons may be abbreviated[4] or may be "evident without express reference". But the Court of Appeal made clear that however brief the reasons given may be, persons in the Court and the public at large through their surrogate, the Press, are entitled to know something of the reasons the Court decided to take a particular action.

[11] So in the case of suppression orders in the Justices of the Peace Court in the Cook Islands it would ordinarily be sufficient if the Justice of the Peace merely noted down a line or two as to why suppression of name or any particulars of the proceeding was granted. But it cannot be the case that as a matter of course under however much pressure the Justice of the Peace may be on the day in question that the decision – and something of the grounds for suppression – is not announced in open Court and recorded in a way which can leave the decision open to appropriate appeal or review.

[12] Reverting to this case and assuming that Mrs Quarter's obvious pregnancy was the reason for the suppression order being made – even though not referred to by the Justice of the Peace – it remains, as Ms Evans submitted, difficult to see why that circumstance of itself would justify suppression of name even within a close knit community such as the Cook Islands. Pregnancies are common place. Mrs Quarter must have conceived well after charged with these offences. Nobody would take amiss of a woman that she was pregnant even if she was a defendant in a criminal

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[4] At [81].

proceeding. Criminal proceedings have no obvious link to pregnancy and, therefore, in these circumstances there seems no justifiable basis on which the order for suppression of name was made apart from the fact that it appears to be a continuation of the practice going on for a long period.

[13] That of itself, especially following the entering of a plea of guilty, is an insufficient basis for an order for suppression and the Crown's appeal on the suppression issue and the necessity for reasons is accordingly allowed.

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Hugh Williams J